IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO. 212 OF 1994

1. Apparao @ Appasha Ganpati Mule.
2. Kheru Seva Rathod — Appellants (Org.Accd.Nos. 1 and 3)

Vs.

The State of Maharashtra — Respondent

Mr. T.E. Mane for Appellants.
Mr. V.B. Konde-Deshmukh, APP for Respondent-State.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : September 23, 2004.

ORAL JUDGMENT (Per S.S. Parkar,J.) :

1. This appeal is preferred against the Judgment and Order of conviction recorded by the II Additional Sessions Judge, Solapur on 31/3/1994 convicting the appellants - original accused nos.1 and 3 for offence under Section 302 read with Section 34 of IPC and sentencing them to life imprisonment and to pay a fine of Rs.2000/- each in default RI for three years in Sessions Case No.110 of 1991.

2. The prosecution case briefly narrated is as follows:-

. The incident in question took place on 31/12/1988

when Fulchand Ghuge, the husband of PW 10 Pushpabai was murdered. It is the case of the prosecution that deceased Fulchand owned 4 acres of land, out of which he sold 2 acres of land to one Nagurao Bachate, resident of Mangarul. The other 2 acres of land was sold to Ganpati Mule, the father of accused no.1 in repayment of loan of Rs.4000/- from him. The land was sold to Ganpati Mule on condition that after repayment of Rs.4000/- the land will be reconveyed to Fulchand. The said transaction had taken place on 20/3/1978 and deceased Fulchand was prepared to repay the sum of Rs.4000/- to Ganpati Mule and asked Ganpati Mule to reconvey the land to him but the latter was not willing to do so. Therefore, there used to be quarrels between accused no.1, the son of Ganpati Mule, and deceased. On the date of the incident the deceased had gone to graze the cattle after taking breakfast. When Fulchand was away from his home, accused no.3 had gone to his house at noon and enquired about Fulchand. When Pushpabai, wife of Fulchand, told him that Fulchand had gone to graze the cattle, accused no.3 told her that he was friend of Fulchand and he waited there till Fulchand returned home at 4 O'clock in the afternoon. Pushpabai thereafter left the house to go to village for grinding Jawar leaving behind her two daughters.

Deceased Fulchand was addicted to Ganja. When Pushpabai came back, her husband was not in the house. She waited for her husband whole day. In the evening, the cousin of deceased came to the house of Pushpabai and told her that he learnt from Naldurga Police that Fulchand was murdered. Thereafter the dead body was brought. Initially, the death of Fulchand was registered as accidental death. Inquest panchanama Exh.12 was drawn on the dead body. At the place, where the dead body was found, two plastic chappals and two leather chappals were found which were seized under spot panchanama Exh.13 along with one polythene bag, one terricot cap, one muflar, one knife in broken condition and one piece of torn shirt. Considering the injuries found on the dead body, PW 1 PSI Ganpat Bhakare was convinced that it was a case of murder and, therefore, he lodged his complaint Exh.14 at Mohol Police Station. The crime was registered for offence under Section 302 of IPC. The dead body was sent for post-mortem examination. Thereafter the investigation was handed over to PSI Kale. Since there was no progress in the investigation, PW 14 Sunil Dhepe in his newspaper had highlighted inaction on the part of the police. The case was thereafter handed over to C.I.D. The accused came to be arrested on 18/10/1989. The specimen of foot prints of accused

no.3 were taken on 12/3/1990. Those specimen of foot prints along with the leather chappals were sent to C.A., Pune on 13/3/1990. In the meantime statements of various witnesses were recorded. After completion of the investigation charge-sheet was filed in the Court of J.M.F.C., Mohol and the case was committed to Sessions Court on 15/4/1990.

3. Before the Sessions Court charge was framed against all the three accused for offence under Section 302 of IPC, to which they pleaded not guilty. On behalf of the prosecution 26 witnesses were examined, those included complainant PW 1 PSI Ganpat Bhakare, attached to Mohol Police Station and the Investigating Officer PW 26 PI Raghunath Lambture who was attached to C.I.D. Wife of the deceased Pushpabai Ghuge was examined as PW 10. Dr. Dnyandeo Kadam who conducted autopsy on the dead body was examined as PW 11. To prove the motive against accused no.1, prosecution has led evidence of PW 8 Dhanraj Ghuge, PW 9 Vishwasrao Ghuge, who was the police patil of the village and PW 14 Sunil Dhepe. The prosecution has also examined PW 21 Arun Bhui, Finger Print Expert. There is also evidence of PW 12 Devrao Chavan, who had last seen accused no.3 with the deceased. Number of persons who had acted as panchas were also examined,

some of whom had turned hostile. The defence of the accused was of total denial. Accused no.3 has filed his Written Statement Exh.85, in which he has stated that in December, 1988 he had been to the Ganpati Temple situate on the Mohol-Pandharpur Road and when he came out of the said temple the pair of his chappal was missing. The said temple is near the place of incident where the dead body was found.

4. After considering the entire evidence on record, the trial court acquitted original accused no.2 for want of sufficient evidence against him, but convicted the appellants, who are original accused nos.1 and 3 for the offence of murder by the impugned Judgment and Order on the ground that motive is proved against accused no.1 and the prosecution has proved the foot prints of accused no.3 on the leather footwear which were seized under spot panchanama from the scene of offence. The said order of conviction and sentence is under challenge in this appeal by the convicted accused.

5. We have gone through the evidence of prosecution witnesses and found that the prosecution has not proved the offence against any of these appellants beyond reasonable doubt. The trial court has

convicted accused no.1 on the basis of motive alone as there is no other evidence led against accused no.1, except that of motive. So far as accused no.3 is concerned, the evidence of last seen together led by the prosecution has been disbelieved by the trial court but he has been convicted only on the basis of the footprints found on the pair of leather chappal seized from the place of incident.

6. PW 10 Pushpabai Ghuge, the wife of the deceased, has deposed that there used to be quarrels between her husband and Ganpati Mule to whom her husband had sold two acres of land. Her evidence is supported by PW 8 Dhanraj Ghuge about the motive. He has deposed that deceased had sold two acres of land, which was the bagayat land, to accused no.1 on reconveyance basis after the return of Rs.4000/-. Deceased Fulchand had gone to accused along with Rs.4000/- and had demanded reconveyance of the land but accused no.1 refused to reconvey the land unless deceased paid him Rs.20,000/- instead of Rs.4000/-. Thereafter there used to be disputes between the two. Similarly PW 9 Vishwasrao Ghuge, who was the police patil of village Anadoor, has deposed that deceased Fulchand had told him that he had sold his land to accused no.1 Apparao for Rs.4000/- with condition of re-purchase on payment of

Rs.4000/- and though he was ready to pay Rs.4000/- to Apparao i.e. accused no.1, the latter was not ready to accept the amount and reconvey the land. Similarly, PW 14 Sunil Dhepe has deposed that deceased Fulchand used to ask Ganpati Mule i.e. the father of accused no.1 to accept the money and return the field and, therefore, there used to be quarrels between the two as Ganpati Mule did not return the land to Fulchand. Fulchand had also obstructed the sugar-cane carts of Ganpati Mule, who is the father of accused no.1. Deceased had also told PW 14 that his life was in danger as he was apprehending that Ganpati Mule's men would finish him. The evidence of aforesaid witnesses does prove the motive against accused no.1. Whether the land was sold to the father of accused no.1 or to accused no.1 himself was not material because ultimately accused no.1 was also concerned about reconveying the land to deceased Fulchand.

7. But the motive by itself cannot prove that the murder of Fulchand was committed at the instance of accused no.1. Neither there is charge of conspiracy framed against the accused nor there is any evidence on record from which the conspiracy between the accused nos.2 and 3 could be inferred for murdering Fulchand. The prosecution has led the evidence of PW

17 Nazeer Pathan to prove that previously accused nos.2 and 3 had requested him to give contract to kill one person of Anadoor who was obstructing sugar-cane crop. Apart from the fact that the said witness had turned hostile and did not at all support the prosecution case, accused no.1 was not directly involved by him even before the police. In the absence of any evidence of conspiracy between accused nos.2 and 3 who are supposed to have killed deceased at the behest of accused no.1, accused no.1 cannot be convicted only on the evidence about the previous enmity and quarrel between the two.

8. So far as the appellant no.2 i.e. original accused no.3 is concerned, the prosecution has relied on the circumstance of last seen with the deceased and seizure of footwear from the place of incident which bore the foot prints of accused no.3. As regards the circumstance that accused no.3 was last seen in the company of deceased is concerned, the prosecution has led evidence of wife of the deceased PW 10 Pushpabai. According to her evidence, on the date of the incident accused no.3, who gave his name as Hiru, resident of Mohol, had come to enquire about Fulchand. When he was told that Fulchand had gone for grazing the cattle, he waited outside till Fulchand returned home

at 4 p.m. on that day. Thereafter she had gone out for grinding of jawar. When she returned home her husband was not in the house nor accused no.3. She has deposed that her husband was addicted to taking ganja and he had left along with accused no.3 for that purpose and thereafter in the evening she learnt about the murder of her husband. The accused were arrested on 18/10/1989 and thereafter T.I. parade was held, in which PW 10 Pushpabai had identified accused no.3 as a person who had gone to her house on the date of the incident to meet her husband. She has, however, admitted in her cross-examination that Police Sub Inspector Lambture had showed her accused no.3 in his office asking her to see accused no.3 minutely as she had to identify him during T.I. parade. With that admission, the significance of holding T.I. parade for Pushpabai to identify accused no.3 is clearly lost. Accused no. 3 was not known to her previously, who had not even disclosed his true name to her. He was not known even to her husband i.e. deceased Fulchand earlier. The trial court has also not relied on that circumstance. The trial court has also disbelieved the identification of accused no.3 by Pushpabai at T.I. parade. Even the evidence of PW 12 Devrao Chavan that he had seen accused no.3 for the last time in the company of deceased cannot advance

the case of the prosecution. He has deposed that he had seen accused no.3 and Fulchand in front of Fulchand's house smoking ganja and thereafter he did not see Fulchand. But in the next breath he deposed that he saw Fulchand last time on market day which was a Thursday along with accused no.3. He has not mentioned the date or month in his evidence.

9. The only other circumstance, which is left to be considered, on the basis of which the trial court has based the conviction of accused no.3 is that the pair of chappal seized under spot panchanama had foot prints of accused no.3. So far as seizure of chappal is concerned, as per the spot panchanama Exh.13, one pair of brown plastic slipper and another pair of leather chappal were attached and seized from the place of offence on 31/12/1988. The specimen foot prints of accused no.3 were taken on 12/3/1990 as per the evidence of PW 26 Police Inspector Lambture. After he was recalled on behalf of the prosecution he has deposed that he had taken six foot prints of each of the legs of accused no.3 on 12/3/1990 under panchanama Exh.84. He has further deposed that he had sent the foot prints of accused no.3 and the chappals seized from the place of incident to the office of C.A., Pune. As per the evidence of Finger Print

Expert PW 21 Arun Bhui the muddemal articles were received by him on 13/3/1990 i.e. the following day after the specimen foot prints of accused no.3 were taken. He examined all specimen foot prints and found them to be identical with the foot impressions present on the chappals sent to him.

10. No doubt, the finding of the footwear at the place of incident on which foot prints of accused no.3 were found would have been a very strong circumstance against accused no.3. But from the evidence on record it appears that accused no.3 was arrested on 18/10/1989 and in the presence of panchas he was made to wear those chappals at the police station on 23/10/1989 as deposed to by panch witness PW 2 Hanmant Sutar. He has further deposed that those chappals fitted in the feet of accused no.3. The said fact is recorded in panchanama dated 23/10/1989 Exh.22. If the accused no.3 was made to wear those chappals in October 1989 and thereafter the said chappals were sent to the expert for comparing the foot prints thereon with the specimen foot prints of accused no.3 on 13/3/1990, both were bound to tally. The specimen foot prints were taken, as stated earlier, on 12/3/1990 and, therefore, tallying of the specimen foot prints with foot prints on the chappals which the

accused was made to wear on 23/10/1989, i.e. after his arrest, cannot be a circumstance which can be used against accused no.3. As regards the identity of chappal is concerned, the prosecution has not established the ownership of accused no.3. Accused no.3 has not admitted in his 313 examination that the chappals which were attached from the place of incident belonged to him. No doubt, in his Written Statement Exh.85 he has tried to explain unwisely that in the month of December 1988 he had been to the Ganpati Temple near the place of offence where he had lost his chappals. But in the absence of specific admission by him or evidence that said chappals belonged to accused no.3, his ownership of the said chappals cannot be said to have been established merely because they fitted him. It is unfortunate that the investigation in this case has been very perfunctory. Not only the initial investigation in the case was not properly made but even after the C.I.D. came on the scene there was no improvement in the quality of investigation. One is at a loss to understand why the pair of chappals was sent to the Finger Print Expert in the month of 1990 when accused no.3 was made to wear the same at the police station on 23rd October, 1989, because the prints on the slippers, even if preserved, would be of 23/10/1989

and not of the date of offence which was 31/12/1988.

11. So far as the injuries on the person of the deceased are concerned, the prosecution has led evidence of PW 11 Dr.Kadam, who had performed autopsy on the dead body. Doctor had noticed about 11 external injuries on the person of the dead body, which included CLW on forehead and incised wounds near the left eye, neck and axillary area. There was also contusion found on the left side of his neck. All the injuries were ante-mortem and the cause of death given by the doctor is the injury to the vital organ like brain, left lung and haemorrhage. The head injury was possible due to hard and blunt object and incised wounds were possible due to sharp weapon like knife, Article No.4. The prosecution has also seized knife lying near the dead body at the place of offence. The medical evidence led by the prosecution leaves no doubt that the deceased had suffered homicidal death. But the prosecution has miserably failed to establish the guilt of the appellants for the murder of deceased Fulchand.

12. In the result, this appeal is allowed and the order of conviction and sentence recorded on 31/3/1994 by the II Additional Sessions Judge, Solapur against

the appellants - original accused nos.1 and 3 for offence under Section 302 read with Section 34 of IPC in Sessions Case No.110 of 1991 is set aside and the appellants are acquitted. Their bail bonds shall stand cancelled. The amount of fine, if already paid, shall be liable to be refunded to the appellants.

(S.S. Parkar, J.)

(S.R. Sathe,J.)